SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 43

STEFENA BROWN,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

GEO. W. CROCKETT, JR.,
3220 Cadillac Tower,
Detroit, Michigan,

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No. 570

STEFENA BROWN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Opinion Below

The opinion of the Court of Appeals (Tr. 41) is reported at 234 F(2d) 140. The opinion of the District Court appears in the Transcript at page 38.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. section 1254. The Petition for the Writ of Certiorari was granted on November 13, 1956.

Statutes and Rules Involved

Title 18, United States Code, Section 401:

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehaviour of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehaviour of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Rule 42 of the Federal Rules of Criminal Procedure:

"Rule 42. Criminal Contempt.

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

Questions Presented

(1) Upon the facts presented by the record here, can it be said that the prior testimony voluntarily given by Petitioner constituted a waiver of her privilege against self-incrimination?

(2) In a summary criminal contempt proceeding, is the Court of Appeals permitted to rewrite the Trial Court's certificate and affirm Petitioner's conviction upon a charge not made by the Trial Court?

Statement of the Case

On April 24, 1953 the United States filed its Complaint for cancellation of Petitioner's citizenship pursuant to Section 340(a) of the Immigration and Nationality Act of 1952 (66 Stat. 260; 8 U.S.C.A. 1451(a)).[1] (Tr. 1-6)

The Complaint alleged that Petitioner was a native of Poland prior to her naturalization by the United States District Court at Detroit, Michigan on November 26, 1946; that in the course of her naturalization process she had stated under oath that she had not been, for the period of at least ten years immediately preceding that date, a member of or affiliated with any organization teaching disbelief in or opposition to organized government; that she had never been a member of the Communist Party; and that she was attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States; that the representations so made were false and that Petitioner knew they were false in that she had been a member of the Communist Party of the United States and the Young Communist League from 1933 to at least February, 1937. It charged that these organizations during that period advised and taught the overthrow by force and violence of the government of the United States.

Petitioner's Answer (Tr. 10) admitted her naturalization as alleged in the Complaint but denied that she had been guilty of any concealment or misrepresentation in the course of her naturalization.

At the trial of the cause the petitioner was called by the Government as a witness under Rule 43(b) of the Federal Rules of Civil Procedure. She answered all questions put

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[1] The statute authorizes the District Courts to cancel certificates of naturalization obtained by concealment of a material fact or wilful misrepresentation.

to her that were limited in time to the period prior to her naturalization in 1946 (Tr. 11-19). Questions which related to Communists or Communist activity and which were unlimited in time or were addressed to the period subsequent to 1946, were refused (Tr. 17). Her refusal in each instance was expressly based upon her privilege under the Fifth Amendment to the Federal Constitution and was sustained by the Trial Judge (Tr. 16-18).

Among other things, petitioner, upon her examination under the Rule, testified that she was never a member of the Communist Party at any time prior to her naturalization in November, 1946 (Tr. 11); that she did not know the prospective prosecution witnesses, Barry Cody, Virgil Stewart or Bereniece Baldwin prior to 1946; but that she did know William Nowell and Earl Reno prior to that date (Tr. 12-13). She was asked about membership in the Communist Party after her naturalization in 1946, attendance at various Communist meetings, and when did she first meet Carl Winter (defendant in *Dennis, et al* v. *U. S.*, 341 U.S. 494). Her claim of the Fifth Amendment privilege was sustained as to each of these inquiries (Tr. 16-19).

At the conclusion of her examination by the District Attorney, defense counsel declined to examine and stated that he intended to call the petitioner as a witness for the defense. (Tr. 19) [2] Accordingly, on the following day, and after the Government had rested its case, defense counsel called the Petitioner to the witness stand (Tr. 19).

On direct examination by her counsel, petitioner's testimony concerning Communist activity continued to be confined to the pre-1946 period. She testified concerning her membership and activities in the Young Communist League from 1930 until January of 1935 (Tr. 21-22); and that from the time she left the Young Communist League until the

[2] Present counsel was retained by Petitioner in the appellate proceedings.

time of her naturalization in 1946 she did not "engage in any Communist Party or Young Communist Party activity." (Tr. 22). She stated also that her leaving the Young Communist League coincided with the expulsion of her husband from the Communist Party in January, 1935 (Tr. 23).

She reaffirmed that she had answered all questions truthfully at the time of her registration in 1940 as an alien under the Alien Registration Act (Tr. 24); and she specifically reaffirmed the truthfulness of the answers concerning loyalty given in her naturalization proceeding and in the taking of her oath of allegiance (Tr. 24-27).

Some of Petitioner's reaffirmances of the truthfulness of answers given in her naturalization papers, are in language of present affirmance as well as re-affirmance of her past statements of loyalty. The Court of Appeals (Tr. 43, 46) attached especial significance to these questions and answers as evidencing a waiver by Petitioner of her Fifth Amendment privilege.[3]

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[3] "Q. In Question 28 you were asked: 'Are you a believer in anarchy, or the unlawful damage, injury or destruction of property, or of sabotage?' And you answered 'No.' Was that a true answer to that question?

A. That was a true answer.

Q. You say it was not only a true answer at the time you filed the petition, July 16, 1946, and is that the true answer today?

A. It is true. It was a perfectly true answer to that question. I never believed in overthrowing anything. I believe in fighting for this country. I like this country. I never told anybody I didn't.

Q. Did you ever teach or advocate anarchy or overthrow of the existing government in this country?

A. Teach?

Q. Did you ever teach the idea that we ought to overthrow the government of the United States?

A. No, I never did.

Q. Did you ever advocate that?

A. No.

Q. Did you ever say that we should?

A. No, I never did.

Q. To your knowledge, did you ever belong to any organization that

The first question put to petitioner on cross-examination by the District Attorney was: "Are you now or have you ever been a member of the Communist Party of the United States?" Petitioner claimed her privilege under the Fifth Amendment and declined to answer. (Tr. 32)

The Court, after hearing argument, held that, by taking the stand, Petitioner had waived her Fifth Amendment privilege (Tr. 33). She was directed to answer. When she adhere to her stated position, the Court cited her for contempt and announced that punishment would be imposed later (Tr. 33-34).

There followed additional citations of contempt predicated upon Petitioner's refusal, after direction, to answer the following questions (Tr. 34-38). In each instance the refusal was based upon the Fifth Amendment:

(1) Q. Isn't it true that in 1947 you were a member of the McGraw Communist Club, District No. 7 of the Communist Party of the United States? (Tr. 34)

(2) Q. Do you know what the Michigan School of Social Science is? (Tr. 34-35) [4]

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taught or advocated anarchy or the overthrow of the existing government in this country?

A. No. As much as I know, I didn't belong, to destroy the country. I believe in helping the country, and helping the people. That was my life of living, not destroying the things that the people put up.

Q. Are attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States?

A. That, I am."

[4] As to this question, it should be observed that the petitioner had answered. The identical question had been put to her on her prior examination by the District Attorney and she answered "No" (Tr. 18). She also was then asked: "Isn't it true that the Michigan School of Social Science is a school conducted and run by the Communist Party of the United States?" Her reliance upon the Fifth Amendment was sustained by the Court as to this and all other questions about this school.

(3) Q. Do you know Barry Cody? (Tr. 35)

(4) Q. What year was the first time that you were a member of the same Communist Party Club as Barry Cody? (Tr. 35)

(5) Q. Isn't it true that there was an executive board meeting of the McGraw Communist Club held at your home in 1948? (Tr. 35)

(6) Q. Isn't it true that you have paid Communist Party dues in the McGraw Communist Club? (Tr. 35)

(7) Q. Did you attend an affair of the Communist Party celebrating the birthday of William Z. Foster, National Chairman of the Communist Party?)[6]

(8) Q. Were you a student in the class at the Michigan School of Social Science in Detroit in 1948, 1949? (Tr. 36)

(9) Q. Did you attend a meeting of the Lenin Memorial sponsored by the Communist Party at any time? (Tr. 37)

(10) Q. In 1948, did you hold Communist Party membership card No. 72066? (Tr. 37)

(11) Q. Did you hold Communist Party membership card No. 72061 in 1949? (Tr. 37)

(12) Q. You mean you never belonged to the Communis Party? (Tr. 38)

At the conclusion of the trial, a judgment was entered cancelling Petitioner's Certificate of Naturalization. No appeal was taken from this judgment.

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[5] Here, again, the witness had previously testified on examination by the District Attorney that she did not know Barry Cody before 1946. (Tr. 12)

[6] The District Attorney indicated that this question was intended to cover "any time that it was celebrated." Petitioner answered "no." The District Attorney then asked "What about February 24, 1951 at the Jewish Cultural Center, 2705 Joy Road, Detroit Michigan?" Petitioner's refusal to answer was predicated upon the Fifth Amendment. (Tr. 36).

Also, at the conclusion of the trial, the Court rendered an oral opinion (Tr. 38) and concluded as follows (Tr. 40):

> "The Court is of the opinion that the defendant, *in taking the stand as a witness in her own behalf*, waived the right to exercise her privilege not to answer questions which might tend to incriminate her, by reason of the Fifth Amendment. And, having refused to answer a number of questions asked of her by the District Attorney, and having been directed by the Court to answer the questions, and having refused to answer the questions, the Court finds the defendant is in contempt of this Court.
>
> Of course, this is a contempt that occurred in the presence of the Court.
>
> Having found the defendant in contempt of court, the Court, therefore, shall impose punishment for such contempt.
>
> It is the sentence of this Court that the defendant be committed to the custody of the Attorney General of the United States for a period of six months, for this contempt of court." (Emphasis ours)

Also at the time of the initial citation for contempt, the Trial Court made it clear that its finding of a waiver by reason of Petitioner's taking the witness stand, was based upon the view "that the same rule applies in a civil suit as it does in a criminal case, and even for perhaps a stronger reason." (Tr. 34)

The Opinion Below

The Court of Appeals said (Tr. 46):

> ". . . We do not consider the question as to whether appellant's merely taking the stand constitutes a wai-

ver. Here she testified at length in her own defense and our conclusions are based upon that fact. . . ."

After discussing the importance and the Constitutional foundation of the right of cross-examination (Tr. 46-47), the Court below held:

". . . We conclude that the rationale of the rule as to waiver of the privilege by the accused who voluntarily offers himself as a witness in his own behalf and testifies in chief applies in civil cases. The appellant here may not defeat cross-examination by claiming protection against compulsory self-incrimination under the constitutional provision. Since cross-examination is a basic right rooted in the Constitution of the United States, it should not be eliminated except by the highest authoritative, legislative, or judicial expression.

. . . When appellant voluntarily offered in her own behalf on direct examination facts material to the issues in the denaturalization proceedings and facts with reference to the period subsequent to 1946, she was compelled to do so 'without reservation, as does any other witness.'. *Raffel v. United States*," (271 U.S. 494).

Summary of Argument

I. At least since the decision of this Court in *Arndstein v. McCarthy*, 254 U.S. 71 (1920), it has been the rule, consistently followed in the Federal Courts, that a party-witness in a civil proceeding does not waive his privilege against self-incrimination unless and until he makes "an admission of guilt or furnish(es) clear proof of crime." Nowhere in the testimony of Petitioner here is there a single admission of guilt or proof of any crime. Neither

the Court of Appeals nor the Trial Court points to any such admission.

II. The Court of Appeals neither affirms nor rejects the Trial Court's finding in its certificate (supra, p. 8) that Petitioner's waiver occurred "in taking the stand as a witness in her own behalf;" instead, the Court of Appeals appears to predicate its finding of a waiver upon the fact that Petitioner voluntarily gave testimony pertinent to the issue. Since this is a summary criminal contempt, Rule 42 of the Federal Rules of Criminal Procedure required that the facts constituting the contemptuous conduct be certified by the Trial Judge. The certificate, thus made, is at once the charge and the judgment.

The necessary effect of the Court of Appeals ruling is to re-write the certificate of the Trial Court so as to find a different basis for guilt than that found by the Trial Court. Not only is Petitioner thus denied an opportunity to make an informed choice and to recede from his initial refusal and answer the questions" or adhere to her previous position and risk the penalty (Cf. *Quinn* v. *United States*, 349 U.S. 155 at 165-166), but her conviction constitutes a conviction upon a charge not made nor found by the Trial Court.

ARGUMENT

I

There Was No Waiver by Petitioner of Her Privilege Against Self-Incrimination

A suit to cancel a certificate of citizenship is a civil proceeding, *Luria* v. *United States*, 231 U.S. 9, 27-28; 34 S.Ct. 10. The defendant who voluntarily testifies in such a proceeding has the same status with respect to the privilege against self-incrimination that any other non-defendant witness enjoys in either a civil or criminal case.

Thus, Dean Wigmore says:

> "For a party defendant in a civil case having a criminal fact as its main issue, the question arises whether his situation is to be assimilated to that of the ordinary witness or to the accused in a criminal case. None of the reasons applicable to the latter case . . . have force here." (Wigmore, Evidence, 3rd ed. Vol. 8, Sec. 2268.)

See also *Bernaudez v. Castillo*, 64 Phil. 483 (1937) and *State ex rel. Doran*, Doran, 245 La. 151 (1949), cited by the author.

Our inquiry thus becomes one of ascertaining the rule applicable in the Federal Courts to ordinary witnesses. The rule is deduced from two decisions of this Court, each of which grew out of a bankruptcy proceeding involving one Arndstein. *Arndstein v. McCarthy*, 254 U.S. 71, 41 S.Ct. 26, and *McCarthy v. Arndstein*, 262 U.S. 355, 43 S. Ct. 562. Both cases were recently reviewed and applied in a scholarly opinion by District Judge Pine in *United States v. Hoag*, 142 F.Supp. 667 (D.C. 1956).[7] We quote

[7] Defendant Hoag was prosecuted under 2 U.S.C.A. 192 for refusal to testify before a Congressional Committee—the "McCarthy Committee." Defendant had refused to answer some twenty-nine questions, specifically invoking the Fifth Amendment. Among others, she was asked:

> "If the Communist Party ordered you to sabotage the work you are doing, assuming that we were at war with Communist Russia, would you obey those orders or would you refuse to obey them?"

Defendant replied as follows:

> "I have never engaged in espionage nor sabotage. I am not so engaged. I will not so engage in the future. I am not a spy or saboteur. . . ."

The Government contended that by this undertaking to answer, defendant had waived her right under the Fifth Amendment to refuse to answer subsequent questions concerning whether she had given information about her work to Communist Party members; had discussed classified Government work at Communist meetings; or had engaged in espionage for the Communist Party seven and one-half years before.

Judge Pine's conclusion (p. 671):

> "The rule of law, therefore, as announced by these cases, is that the voluntary answer must be 'criminating' to prevent the witness from stopping short and refusing further explanation. The defendant in this case did not testify as to any criminating facts; on the contrary her testimony relied on by the Government as requiring her to answer the questions herein involved were completely non incriminating in character and, under the authorities above mentioned, she had the right to 'stop short' and assert her privilege."

The rule thus set forth in the *Arndstein* cases has been consistently applied by this Court.

In *Counselman* v. *Hitchcock*, 142 U.S. 547, the witness testified that he was in the grain business and received shipments over particular interstate railroads. It was relevant to inquire, therefore, if he had received rates on shipments from outside the state less than the tariff or open rate. Notwithstanding the relevancy of the question, the claim of the privilege was sustained.

In *Hoffman* v. *United States*, 341 U.S. 479 (1951), 71 S. Ct. 814, where the defendant had admitted knowing Weisberg, the subsequent question as to whether he had seen Weisberg "this week" was clearly pertinent and relevant. Nevertheless, the Court held that his answer to the first question did not deprive him of his privilege as to the second.

Similarly, in *Patricia Blau* v. *United States*, 180 F.(2d) 103, rev. in 340 U.S. 159 (150), 71 S.Ct. 223, the defendant answered in the negative the question whether she possessed Communist Party records. Subsequent questions designed to ascertain from her the location of the records were thus pertinent. Nevertheless, her claim of the privilege as to these subsequent questions was upheld by this Court.

In *Bart* v. *United States*, 349 U.S. 219 (1955) the defendant admitted that he had been "organizer and head of the Communist Party" (at p. 224). His right to rely upon his privilege, however, was sustained by this Court with respect to divulging the names of "other officials of . . . the Communist Party." (224-225)

Again, in *United States* v. *Nelson*, 103 F. Supp. 213, the defendant's affirmative answer to the question whether or not he was a member of the Communist Party, made pertinent and relevant the subsequent questions, intended to show the nature and extent of his Party associations and activities. But his claim of the privilege as to these subsequent questions was sustained by the Court.

The foregoing cases reflect the rule consistently applied by this Court to ordinary witnesses and parties alike in civil proceedings. In none of these was there a previous "admission of guilt" or "proof of crime." Thus, under the Federal rule each of these witnesses was permitted to claim the privilege; there had been no waiver.

This rule, reiterated by this Court in its second *Rudstein* opinion at 262 U.S. 355, is well known to the Government. Indeed, in its brief in this Court in *Rogers et al* v. *United States*, 340 U.S. 367 (1951), 71 S. Ct. 438, the Government conceded that, as applied to ordinary witnesses, the rule with respect to waiver by prior testimony was not dependent upon considerations of relevancy of cross-examination; but rather, upon whether or not the witness' prior testimony was incriminating. Thus, the Government there said in its brief (pp. 25-26):

> "Where the witness is not the defendant in a criminal prosecution, there is a substantial body of authority that testimony as to a transaction waives the privilege with respect to all other inquiries pertinent to that transaction. This Court, however, has indicated that

the privilege is not waived merely by testimony as to a transaction and that before the witness can be held to have waived there must be an element of incrimination in what he has disclosed."

This Court, in its opinion in *Rogers*, reaffirmed this rule and referred to its *Arndstein* opinions reported in 254 U.S. 71 and 262 U.S. 355.

In *Rogers* this Court said (at p. 372):

> "In Blau v. United States, 1950, 340 U.S. 159, 71 S.Ct. 223, we held that questions as to connections with the Communist Party are subject to the privilege against self-incrimination as calling for disclosure of facts tending to criminate under the Smith Act, 18 U.S.C.A. § 2386. But petitioner's conviction stands on an entirely different footing, for *she had freely described her membership, activities and office in the Party.* Since the privilege against self-incrimination presupposes a real danger of legal detriment arising from the disclosure, petitioner cannot invoke the privilege where response to the specific question in issue here would not further incriminate her. Disclosure of a fact waives the privilege as to details. As this Court stated in Brown v. Walker, 1896, 161 U.S. 591, 597, 16 S.Ct. 644, 647, 40 L.Ed. 819:
>
> > "Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure.' " (Emphasis ours)*

*Rogers, when thus read in conjunction with the two *Blau* cases (340 U.S. 159 and 340 U.S. 332), stands for the proposition that mere admission of *membership* alone "does not constitute a waiver of the privilege so as to require the answering of further questions relating to the witness'

See also *Smith* v. *United States*, 337 U.S. 137, 149; 69 S.Ct. 1000, where this Court refused to find a waiver based upon prior testimony voluntarily given in a civil proceeding. The testimony was given under conditions where it was clear that the witness intended to claim his privilege and the statement relied on by the Government to show a waiver contained no incriminating facts nor admission of guilt.

Applying this rule in the foregoing cases to the facts in the instant case, it would appear that the Court of Appeals, by its judgment here, has determined that in a civil proceeding a negation by a witness of anything incriminating and an affirmance of her innocence is itself a waiver of the privilege. For the gravamen of the opinion of the Court below is its statement that

> "... When appellant voluntarily offered in her own behalf on direct examination facts material to the issues in the denaturalization proceedings and facts with reference to the period subsequent to 1946, she was compelled to do so without reservation, as does any other witness." (*Raffel* v. *United States*, supra)

The test, however, is not whether the witness has offered material evidence; rather, as this Court stated in the *Arnstein* opinions, supra, the test is whether the witness has made an "actual admission of guilt or incriminating facts."

Nowhere in petitioner's direct testimony is there a single admission of guilt or an incriminating fact. She admitted membership in the Young Communist League prior to 1935; she admitted knowing certain prosecution witnesses prior to 1946; and she denied membership in the Communist

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activities in connection with it." 19 A.L.R. (2d) at p. 393, note 14. A fortiori, a denial of membership and affirmance of loyalty does not constitute a waiver. See Dean Griswold's discussion of *Rogers*, Griswold *"The Fifth Amendment Today,"* 22-24.

Party at any time prior to 1946. Certainly, there is nothing in any of these answers which would tend to incriminate her under any law in effect at the time.

If we assume (as the Trial Court must have) that the basis for the fear of self-incrimination here is rooted in the prosecutions under the Smith Act and the Attorney General's highly publicized threat of additional conspiracy prosecutions of alleged Communists (referred to by Circuit Judge Denman in *Alexander* v. *United States*, 181 F(2d) 480 (C.A. 9th)), then it is certainly understandable that one may be willing to testify and admit Communist associations in the pre-1946 period (especially when such associations ceased in 1935), and yet have a justifiable fear of prosecution should she answer similar inquiries with respect to the post-1946 period. Any prosecution for Communist activity in the pre-1946 period was outlawed by the applicable statute of limitations. (Cf. *Costello* v. *United States*, 222 F(2d) 656 (C.A. 2); and there could be no reasonable basis for a fear of self-incrimination based upon such testimony. In any event, prosecution for such activity in the pre-1935 period is hardly authorized under a Smith Act adopted in 1940.

When examination is made of the post-1946 testimony quoted by the Court of Appeals to show a waiver (supra, note, p. 6), it is evident that such testimony contains no admission of guilt or proof of crime. Thus, Petitioner testified that she was not a believer in anarchy or sabotage at the time of her 1946 naturalization and *that she is not so now*. (Cf. *United States* v. *Hoag*, supra, note, p. 11). She further testified that she *never* taught or advocated nor belonged to any organization that taught or advocated anarchy or the overthrow of existing government in this country; that she *is* attached to the principles of the Constitution of the United States; and that she *is* willing to take up arms in

defense of this country. Finally she testified that she *never* attended any Communist meetings with Virgil Stewart or Berenicce Baldwin.

This is the total of the "admissions" made by Petitioner. Nowhere is there here an admission of criminal conduct; rather, there is here a denial of unlawful conduct and a protestation of loyalty. A denial is never a waiver. 58 *Am. Jur.* "*Witnesses*," *Sec. 54.*

The error made by the Court of Appeals is that it equates the evidence question of relevancy of cross-examination with the constitutional question of waiver of the privilege against self-incrimination. The Court of Appeals bottoms its holding upon the decision of this Court in the criminal case of *Raffel* v. *United States*, 271 U.S. 494. But the *Raffel* case, as well as *Johnson* v. *United States*, 318 U.S. 189, *Powers* v. *United States*, 223 U.S. 303, and the other criminal cases cited by the Court below in its opinion, were familiar to this Court at the time of its opinions in the *Hoffman*, *Blau*, *Smith*, *Rogers*, and *Quinn* cases (supra); indeed, both *Raffel* and *Johnson* are cited in Smith (note 10) and the *Powers* case is cited by this Court in *Rogers* (footnote 13). But each of these cases is cited for the proposition that the privilege can be waived and that *in a criminal case* a defendant who voluntarily takes the stand on the issue of his guilt or innocense waives his right to rely upon the privilege with respect to any questions pertinent and relevant to the issue of his guilt of the offense for which he is being tried. This Court has never equated this rule, applicable to the accused who voluntarily takes the stand, with the rule of the *Arndstein* cases which applies to all other witnesses in civil and criminal cases alike.

There are cogent reasons for this differentiation between the accused and all other witnesses; chief among them being that the accused may not be called as a witness against his

will; he need not claim his privilege; and no inferences can be drawn from his failure to testify. His rights in these respects are automatically protected by the literal language of the Fifth Amendment since he is already "a person" in a criminal case." But as to all other witnesses, the Amendment confers no automatic protection. They may be compelled to take the stand and testify; they must claim the privilege under oath and with respect to a specific inquiry (*Enrichi* v. *United States*, 212 F(2d) 702 (C.A. 10, 1954)); the claim must be made in a context showing a likely probability that an answer by him might be incriminating (*Hoffman* v. *United States*, supra; see also *United States* v. *Coffey*, 198 F(2d) 438 (C.A. 3rd, 1952)); and, finally, unfavorable inferences may be drawn from his silence where there is a duty to speak and "tendency to incriminate" is not evident. (*Bilokumsky* v. *Tod*, 263 U.S. 149, 154).

The Court of Appeals justifies its adoption to this civil proceeding of the rule applicable to the accused in a criminal case, by calling attention to the possibility that otherwise evidence "tending to convict a party of perjury" in a contract case, or to convict a defendant in a civil tax case of violation of criminal law, might never be uncovered. (Tr. 48). But this is precisely the choice which the framers of the Fifth Amendment elected to make.[9] They believed that society was better served by letting an occasional guilty party go unpunished than by endeavoring to compel his admission of guilt.

Indeed, the application here of the rule applicable to an accused would be contrary to the policy of the law and would adversely affect the administration of justice.

In the absence of constitutional or statutory restrictions as to competency and privileged communications, the policy of the law requires that every inducement be afforded for

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[9] See *Griswold, "The Fifth Amendment Today,"* 6-8.

full disclosure of the facts upon which the judicial process is to operate. Any rule that would conclusively infer a waiver of constitutional rights from the mere taking of the stand by a party in a civil proceeding necessarily serves to inhibit such full disclosure.

And this is especially true in a denaturalization proceeding where the defendant's failure to testify in his own behalf may result not so much in the loss of property, but in the loss of his citizenship. Thus, the defendant in such a case is placed at a disadvantage far more serious than that faced by a defendant even in a criminal case. In almost every instance the party in a denaturalization proceeding involving his beliefs or opinions or political views is the only one who can testify to the facts essential to his defense.[10] Thus, if he does not take the stand he runs the risk of losing his valuable right of American citizenship by default. If he does take the stand, according to the ruling of the Trial Judge here, he loses his right under the Fifth Amendment to refrain from incriminating himself. Moreover, if he does incriminate himself he also may lose his citizenship.[11] (Concerning the unfairness of such a choice, see the opinion of the Sixth Circuit in *Aiuppa v. United States*, 201 F(2d) 287, 300.)

II

In a Summary Criminal Contempt Proceeding, Is the Court of Appeals Permitted to Rewrite the Trial Court's Certificate and Affirm Petitioner's Conviction Upon a Charge Not Made by the Trial Court?

This case was heard and determined in the Trial Court upon the sole issue of whether the Petitioner, by volun-

[10] See Griswold, op. cit., pp. 8-9.

[11] If he is convicted the convicting court is authorized to cancel his citizenship. (Sec. 738e Nationality Act, 1940, 8 U.S.C. 738e.) (*Bridges v. United States*, 199 F.(2d) 845).

tarily taking the stand as a witness in her own behalf, waived her privilege under the Fifth Amendment. The Court made it clear that it was applying the rule in criminal cases where the accused takes the stand; and it expressly grounded its adverse decision upon this and this alone (supra, p. 8). Hence, it must be assumed that the Trial Judge found nothing in Petitioner's direct testimony that constituted "an admission of guilt or furnish clear proof of crime;" and that, but for his view that "taking the stand" constituted a waiver, there would have been no charge and no conviction of contempt.

In thus applying to this case the rule applicable to the accused in a criminal case, the Trial Court inferred a wavier as a matter of law. For in a criminal case the accused who takes the stand will not be heard to say he did not intend a waiver; the waiver follows as a matter of law from his voluntarily offering himself as a witness. *Johnson* v. *United States*, 318 U.S. 189; 63 S. Ct. 549.

The *Arndstein* rule, on the other hand, is different in that the waiver is inferred as a matter of fact. The issue is the witness' intent and the rule holds that the trier of the facts is justified in inferring an intention to waive in those cases where the ordinary witness' testimony constitutes "an admission of guilt or furnishes clear proof of crime." The inference of waiver thus drawn from the witness' voluntary testimony is basically the same as the inference of waiver in any other field of law; the conduct or statement by a witness amounting to abandonment of the privilege must be plainly inconsistent with his assertion of the privilege. Cf. *Smith* v. *United States*, supra; *Quinn* v. *United States*, 349 U.S. 155, and *Emspak* v. *United States*, 349 U.S. 190. Indeed, the only difference between the factual inference to be drawn in cases such as the instant one and that in other situations, is that here we deal with a constitutional privilege and the intent to waive is not

lightly to be inferred. *Smith v. United States*, supra.

Here, then, is the basic distinction between the Trial Court's certificate and the Court of Appeals ruling: The Trial Court erroneously applied the rule applicable to an accused in a criminal case and, in so doing, it concluded *as a matter of law* that a waiver occurred regardless of the intention of Petitioner. It did not apply the *Arndstein* rule and, hence, it did not find *as a fact* that Petitioner's prior testimony evidenced an intention to waive the privilege. Yet, a proper finding of a waiver is a fact essential to the charge of refusal to testify.

The Court of Appeals, on the other hand, declined to affirm or reverse the Trial Court's erroneous conclusion of law, and proceeded to find *as a fact* that Petitioner's prior testimony did constitute a waiver. The finding is erroneous, as we have seen, because nowhere in Petitioner's prior testimony is there any admission of guilt or proof of crime.

Thus, the Court of Appeals has undertaken to make a factual finding, essential to sustain the charge against this Petitioner, when such a finding was not and could not properly have been made by the Trial Court.[12] The effect of this action by the Court of Appeals is to re-write the certificate of the Trial Court and change the charge which the Trial Court undertook to make in its certificate. Petitioner, therefore, now stands convicted upon a charge not made. The action of the Court of Appeals is thus at variance with the holdings of this Court in *Cole* v. *Arkansas*, 333 U.S. 196, and *DeJonge* v. *Oregon*, 229 U.S. 333, 362.

This action by the Court of Appeals would be serious enough where it related to a criminal conviction after trial. Here, however, we deal with a summary conviction for crime. Summary punishment for contempt is an exercise

[12] It is familiar law that the Courts of Appeals are not triers of the facts. *Roberts* v. *U.S.*, 151 F.(2d) 664 (C.A. 5th).

of exceptional and drastic judicial power and repeated decisions of this Court dictate that the power shall be severely limited and strictly construed. *Cooke v. United States*, 267 U.S. 517, 539; *In Re Oliver*, 333 U.S. 257, 275. This appears to be the reason for the requirement in Rule 42 of the Rules of Criminal Procedure that "The order of contempt shall recite the facts and shall be signed by the judge and entered of record." The action of the Court of Appeals is in clear violation of this rule.

Conclusion

Thus, we see that whether the theory relied on by the Trial Court is considered or that relied on by the Court of Appeals, the conclusion in either instance is erroneous. The judgment below should be reversed and Petitioner discharged.

Respectfully submitted,

GOODMAN, CROCKETT, EDEN
& ROBB,
By GEO. W. CROCKETT, JR.,
Counsel for Petitioner,
3220 Cadillac Tower,
Detroit 26, Michigan.

Dated at Detroit, Michigan, this 1st day of February, 1957.